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Supreme Court, U.S.
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In The

# Supreme Court of the United States

CHARLES PHELPS, JR.,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

WHETHER THE FIFTH CIRCUIT COURT OF APPEALS ERRED IN CONCLUDING THAT OVERPAYMENT OF SOCIAL SECURITY TAXES COULD NOT BE CONSIDERED IN DETERMINING PETITIONER'S "TAX LOSS" UNDER U.S.S.G. § 2T1.1(c).

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## PETITION FOR WRIT OF CERTIORARI

Now Comes Petitioner, CHARLES PHELPS, JR., and pursuant to SUP. CT. R. 13.3, respectfully submits his Petition for a Writ of Certiorari.

## OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, dated February 12, 2007, affirmed Petitioner's sentence. *United States v. Phelps*, 478 F.3d 680 (5th Cir. 2007). App. 1-6. The district court imposed Petitioner's sentence on August 19, 2005. App. 7-16.

## JURISDICTION OF THE COURT OF FIRST INSTANCE

This case originally arose from the prosecution of offenses against the laws of the United States, including violation of 18 U.S.C. § 371. The court of first instance had jurisdiction of Petitioner's matter under 18 U.S.C. § 3231.

## JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The Court of Appeals entered judgment on February 12, 2007. Thereafter, Petitioner filed a timely Petition For Panel Rehearing, which was denied on March 16, 2007. App. 17. This petition is filed within 90 days of the denial of the Petition for Panel Rehearing. *See* SUP. CT. R.

13.3. This Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

## FEDERAL SENTENCING GUIDELINES PROVISIONS INVOLVED

Federal Sentencing Guideline § 2T1.9 provides in pertinent part that:

(a) Base Offense Level (Apply the greater):

(1) Offense level determined from § 2T1.1 or § 2T1.4, as appropriate; or

(2) 10.

Federal Sentencing Guideline § 2T1.1 provides in pertinent part that:

(a) Base Offense Level:

(1) Level from § 2T4.1 (Tax Table) corresponding to the tax loss; or

(2) 6, if there is no tax loss.

* * *

(c) Specific Instructions

For the purpose of this guideline –

(1) If the offense involved tax evasion or a fraudulent or false return, statement, or other document, the tax loss is the total amount of loss that was the object of the offense (i.e., the loss that would have resulted had the offense been successfully completed).

Federal Sentencing Guideline § 2T4.1 provides in pertinent part that:

| Tax Loss (Apply the Greatest) | Offense Level |
|---|---|
| * * * | |
| (E) More than $30,000 | 14 |
| (F) More than $80,000 | 16 |

## STATEMENT

Petitioner Charles Phelps, Jr., pleaded guilty to a Klein conspiracy, 18 U.S.C. § 371, pursuant to a negotiated agreement with the Government. The Factual Basis of Petitioner's plea, prepared by the Government, and signed by the parties, described Petitioner's conduct for a period of years in which he reported his wage income on the personal tax returns of his family members. App. 19-23. As described in the Factual Basis, beginning in 1997, Petitioner told his son that he would prepare and file his income tax returns for him. App. 19. From 1997, continuing up to 2002, the son signed blank Form 1040 Individual Tax Returns each year for the 1996 through 2001 tax years. App. 19. Each year, the son would provide Petitioner with his W-2 forms for use in preparation of the return. App. 19. Each year, Petitioner included his own income, including interest and dividend income, on his son's returns. App. 23.

In 1999, Petitioner asked his aunt to claim $100,000 in his wages on her 1998 Individual Tax Return, explaining that he was going through a divorce and wished to hide his income. App. 21. The aunt agreed, and reported Petitioner's wages on her own return, paying the tax due and owing with money provided by Petitioner. App. 21. In

2000, the aunt reported $45,500 of Petitioner's wages – again at his request – on her personal return for the 1999 tax year. App. 22. According to the Factual Basis, Petitioner's acts were "designed to conceal the true source and disposition of funds that were actually earned by [Petitioner], and in so doing would impair and impede the lawful function of the Internal Revenue Service." App. 23.

The Probation Officer computed the tax loss under the 2001 version of the Federal Sentencing Guidelines, and concluded that the income Petitioner reported on his family members' returns resulted in a tax loss of $134,831.[1] Petitioner objected to the Probation Officer's computation of the loss, both in writing and at his sentencing hearing.

At sentencing, the Government offered evidence of tax loss through the case agent, and through the introduction of a chart summarizing its loss computations. App. 24. To determine the tax loss, the case agent applied the diverted income reported on Petitioner's family members' returns, plus interest and dividends, to the income reported on Petitioner's individual tax returns. The case agent did not testify as to his calculation of Petitioner's gross income, nor to the application of a particular tax rate either to Petitioner's gross or under-reported income. The case agent gave Petitioner credit for $24,244 in taxes paid in with his family members' returns. App. 24. According to the Government, the tax loss resulting from Petitioner's scheme was $132,038.50. App. 24.

Against the Government's tax loss calculation, Petitioner called Ms. Laura Sanders, a financial analyst for

[1] The relevant portions of the 2001 Federal Sentencing Guidelines are identical to the 2006 version of the Federal Sentencing Guidelines.

the law firm, Strasburger and Price, L.L.P. Prior to her employment with Strasburger and Price, Ms. Sanders had been a Special Agent with the Internal Revenue Services' Criminal Investigation Division; in 2000, she became a certified fraud examiner. Ms. Sanders' detailed schedules of her computations were admitted in evidence, some of which are reproduced here. App. 25-27.

Ms. Sanders arrived at her determination of tax loss by examining the returns of Petitioner's family members, and subtracting the diverted income from those returns. After deducting the diverted income, Ms. Sanders determined how much tax would have been owed by Petitioner's family members without the inclusion of the diverted income. Ms. Sanders was then able to determine how much excess tax and been paid on the family members' returns.

Next, Ms. Sanders examined Petitioner's personal tax returns to determine the taxable income which had been reported there. Ms. Sanders added the diverted monies to Petitioner's personal returns to arrive at Petitioner's corrected taxable income. To this total, Ms. Sanders applied the 28% tax rate described at U.S.S.G. § 2T1.1(c)(1) to arrive at the tax due. Ms. Sanders deducted from the tax due those taxes paid in by Petitioner at the time he filed his individual returns, plus the excess taxes paid in with Petitioner's family members' returns. Ms. Sanders determined that the Government had failed to credit Petitioner with all of the taxes paid in with his family members' returns.[2] According to Ms. Sanders'

[2] While Petitioner's case was on appeal, Respondent notified Petitioner by letter, and in its responsive brief, that it had failed to

(Continued on following page)

detailed analysis, Petitioner's total taxable income from 1996 through 2001, including unreported dividend income, was $1,134,013. At a 28% tax rate, Petitioner's total tax due during this period was $317,296. The total tax paid in – both through payroll withholdings and with the returns – was $237,060, resulting in a tax deficiency of $80,463.64 for the tax years 1996 through 2001.

Finally, Ms. Sanders explained that, through the family members' 1996 through 2001 returns, Petitioner had actually paid in $42,250.10 in excess Social Security taxes, above the 12.9% annual ceiling, which had not been taken into account in the Government's calculations. App. 26. When the excess Social Security taxes were deducted from the $80,463.64 tax deficiency, the tax loss to the Internal Revenue Service was $38,213.54. App. 27.

In determining tax loss, the district court made the following finding:

> I find that the evidence is more than sufficient to use as an amount of loss in calculating the base offense level the amounts attributable to him in the form of additional taxes. And that's basically embodied in Government's Exhibit 1 in this case. It's less than $200,000, but it's more than $80,000.

Later in the sentencing hearing, after determining the guideline factors, the district court commented:

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credit him with $33,000 in taxes paid in through his family members' returns.

> There is just no question in my mind that Mr. Phelps . . . intentionally set out to conceal the source of these funds, to conceal the true recipient of the funds, to do everything possibly he could to hide what was going on, and with the obvious, with the obvious, if not objective, side effect of fooling the Internal Revenue Service and trying to avoid the payment of taxes that were justly due and owing. And I've taken that into consideration in determining the base offense level in this case and will also consider it in imposing a sentence within that guideline range.

The district court determined the base offense level at Level 16. U.S.S.G. § 2T4.1(F). The court increased Petitioner's offense level by two levels for "sophisticated concealment," U.S.S.G. § 2T1.1(b)(2), and by two levels for use of a person under eighteen years of age to commit the offense, U.S.S.G. § 3B1.4. This resulted in a Total Offense Level of Level 20. Petitioner's Criminal History Category was Category I, resulting in a guideline range of 33 to 41 months. U.S.S.G., Ch. 5, *Sentencing Table*. Petitioner was sentenced by the district court to a term of 36 months' confinement. Had the district court given Petitioner credit for the excess Social Security taxes he had timely paid, Petitioner's base offense level would have been a Level 14, and his Total Offense Level – with the adjustments found by the district court – a Level 18, resulting in a guideline range of 27 to 33 months.

Petitioner filed a timely Notice of Appeal from the district court's determination of his sentence. As in the court below, Petitioner contended on appeal that the district court erred in determining the tax loss. On February 12, 2007, a panel of the Fifth Circuit Court of Appeals, consisting of Judges Reavley, Jolly, and Benavides,

affirmed Petitioner's sentence in a published, *per curiam* opinion. *United States v. Phelps*, 478 F.3d 680 (5th Cir. 2007); App. 1-6.

## REASONS FOR GRANTING THE WRIT

1. Review should be granted because the Fifth Circuit's decision in Petitioner's case is in conflict with a decision of the Second Circuit Court of Appeals, *United States v. Martinez-Rios*, 143 F.3d 662 (2d Cir. 1998) on the same important matter. SUP. CT. R. 10(a).

2. Review should be granted because the Fifth Circuit Court of Appeals, in construing U.S.S.G. § 2T1.1 in line with the Seventh and Tenth Circuit Courts of Appeals, has decided an important issue of federal law that has not been, but should be, settled by this Court. SUP. CT. R. 10(c).

## ARGUMENT

### I. WHETHER THE FIFTH CIRCUIT COURT OF APPEALS ERRED IN CONCLUDING THAT OVERPAYMENT OF SOCIAL SECURITY TAXES COULD NOT BE CONSIDERED IN DETERMINING PETITIONER'S "TAX LOSS" UNDER U.S.S.G. § 2T1.1(c).

#### A. Resolution Of Petitioner's Challenge To The District Court's Tax Loss Determination.

The Fifth Circuit concluded that a determination of whether Petitioner was entitled to credit against the tax loss for excess Social Security taxes he had paid in through his family members' returns depended upon

whether Petitioner's overpayment of the Social Security taxes was intentional. *United States v. Phelps*, *supra*, 478 F.3d at 681-82 ("tax loss is the intended loss, not the government's actual loss"). App. 4. Though noting the conflicting decision of the Second Circuit in *United States v. Martinez-Rios*, 143 F.3d 662, 671 (2d Cir. 1998), which interpreted U.S.S.G. § 2T1.1 as giving "a defendant the benefit of legitimate but unclaimed deductions" in calculating tax loss, the Fifth Circuit aligned itself with the Seventh and Tenth Circuits, which preclude giving a tax fraud defendant the benefit of unclaimed deductions. *Id.*, citing *United States v. Chavin*, 316 F.3d 666, 678 (7th Cir. 2002), and *United States v. Spencer*, 178 F.3d 1365, 1368 (10th Cir. 1999). App. 3. On the merits, the Fifth Circuit was not persuaded that the amount of tax loss Petitioner intended to cause should be reduced "simply because his scheme to defraud apparently inadvertently caused payment of excess social security taxes." App. 6.

### B. The Applicable Tax Fraud Guidelines, And The Commentary.

U.S.S.G. § 2T1.9 provides the method for determining tax loss where, as here, Petitioner was convicted of a Klein conspiracy. Section 2T1.9, in turn, directs that the offense level be determined by reference either to § 2T1.1 or § 2T1.4. Because Petitioner's conduct involved false returns, tax loss was to be determined in accordance with § 2T1.1(c)(1) – "the total amount of loss that was the object of the offense (*i.e.* the loss that would have resulted had the offense been successfully completed)." U.S.S.G. § 2T1.1, Note A, provides that:

> If the offense involved filing a tax return in which gross income was underreported, the tax

> loss shall be treated as equal to 28% of the unreported gross income . . . plus 100% of any false credits claims against tax, ***unless a more accurate determination of the tax loss can be made***. (Emphasis added.)

In the *Commentary* to § 2T1.1, Application Note 1 explains that "tax loss" is defined in subsection (c), and generally corresponds to the "criminal figures." When indirect methods of proof are used, the amount of tax loss may be uncertain, and the guidelines contemplate that the court, in this event, will make a reasonable estimate based on the available facts. *Id.* Application Note 1 further explains that:

> In determining the tax loss attributable to the offense, the court should use as many methods set forth in subsection (c) and this commentary as are necessary given the circumstances of the particular case. If none of the methods of determining the tax loss set forth fit the circumstances of the particular case, the court should use any method of determining the tax loss that appears appropriate to reasonably calculate the loss that would have resulted had the offense been successfully completed.

### C. Under The Tax Code, Social Security Taxes Must Be Credited Against The Tax Imposed.

Title 26, United States Code § 31(a)(1) provides that:

(a) Wage[3] withholding for income tax purposes

(1) In general

[3] Under the Tax Code, "wages" are generally defined as "all remuneration.... for services performed by an employee for his employer." Title 26, Subtitle C, Chapter 24, Section 3401(a).

> The amount withheld as tax under chapter 24[4] ***shall be allowed to the recipient of the income against the tax imposed*** by this subtitle. (Emphasis added.)

Where Social Security taxes have been overpaid, "proper adjustments, with respect to both the tax and the amount to be deducted, shall be made, without interest, in such manner and at such times as the Secretary may by regulations prescribe." 26 U.S.C. § 6413(a)(1). Adjustments for overpayment of Social Security taxes may be made to an employee by credit or refund. 26 U.S.C. § 6413(b) and (c)(1).

### D. There Is A Conflict In The Circuits Regarding The Determination Of Tax Loss Under U.S.S.G. § 2T1.1.

There is little authority on how the various considerations under U.S.S.G. § 2T1.1 are to be interpreted. In *United States v. Martinez-Rios*, 143 F.3d 662, 671 (2d Cir. 1998), the Second Circuit concluded that a sentencing court need not base its determination of tax loss on gross unreported income if it can make "a more accurate determination of the intended loss," a determination which "involves giving the defendant the benefit of legitimate but unclaimed deductions." The Second Circuit explained that, prior to the 1993 amendments to § 2T1.1, a court was precluded from giving a defendant credit for legitimate,

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[4] Chapter 24 of the Tax Code pertains to Social Security taxes. *See* Title 26, Subtitle C, Chapter 24, Sections 3402 to 3406.

but unclaimed, deductions.[5] *Id.* In the Second Circuit, allowing such deductions under the amended version of the guidelines is appropriate because the amended version of the guideline provides for harsher penalties. *Id.* Subsequently, in *United States v. Gordon*, 291 F.3d 181, 187 (2d Cir. 2002), the Second Circuit explained that "tax loss" under § 2T1.1 "is intended to reflect the revenue loss to the government from the defendant's behavior."

The Seventh and Tenth Circuit Courts of Appeals have rejected the Second Circuit's approach to determination of tax loss. In *United States v. Chavin,* 316 F.3d 666, 669 (7th Cir. 2002), the defendant was charged with making a false statement on his 1992 return by reporting a false carry-over loss. On appeal, Chavin argued that the tax loss figure would have been lower if the district court had considered all of his legitimate business deductions which he mistakenly failed to claim on his return, plus that portion of the bad debt loss he had deducted which was legitimate. *Id.* at 676-77. Though noting the Second Circuit's decision in *Martinez-Rios*, the Seventh Circuit concluded that, under the post-1993 version of the guidelines, "tax loss" is defined as the "object of the offense" which, under the post-1993 amendments, specifically excludes consideration of unclaimed deductions under § 2T1.1.[6] *Id.* at 678.

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[5] *See also United States v. Maali*, No. 6:02-CR-171 (M.D. Fla. 2005) ("the very definition of 'loss' contemplates the consideration of unclaimed deductions").

[6] Both the Second Circuit in *Martinez-Rios*, *supra*, 143 F.3d at 673-74, and the Seventh Circuit in *United States v. Twieg*, 238 F.3d 930, 932 (7th Cir. 2001), have concluded that delinquent Social Security taxes or self-employment taxes may be included in a determination of "tax loss."

(Continued on following page)

In *United States v. Spencer*, 178 F.3d 1365, 1366 (10th Cir. 1999), part of the defendant's scheme to defraud the government was to divert a significant number of checks made payable to his companies to secret bank accounts under his control. *Id.* The diverted income was not reported either by the defendant or by his companies. *Id.* On appeal, the defendant argued that if the company had properly reported the income diverted to his private accounts, the company could have paid him the money legitimately in the form of executive compensation or bonuses. *Id.* at 1368. The Tenth Circuit disagreed, explaining that it did not read U.S.S.G. § 2T1.1(c), Note A, as "giving taxpayers a second opportunity to claim deductions after having been convicted of tax fraud." *Id.*

Petitioner's case presents a somewhat different issue from those presented in *Martinez-Rios*, *Chavin*, and *Spencer*. Petitioner did not ask the district court to give him the benefit of legitimate, but unclaimed, deductions.[7] Rather, Petitioner requested that the $42,2500.10 in excess of Social Security taxes he timely paid in per his family members' returns be deducted against the tax loss.[8]

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Surely, where excess Social Security taxes have been paid in timely, the converse is also true, and a credit against tax loss is warranted.

[7] Application Note 5 explains that a "credit claimed against tax" is an item that reduces the amount of tax directly. In contrast, a "deduction" is an item that reduces the amount of taxable income. *Id.*

[8] This Court has explained that, for FICA (Federal Insurance Contributions Act), and FUTA (Federal Unemployment Tax Act) purposes, taxes shall be assessed against "wages paid" during the particular calendar year. *United States v. Cleveland Indians Baseball Company*, 532 U.S. 200, 209 (2001), citing 26 U.S.C. § 3111(a) (setting Social Security tax rates for "wages paid during" particular calendar years) (other citations omitted).

The excess Social Security taxes paid in by Petitioner did not result in a loss to the Internal Revenue Service.

### E. Petitioner's Overpayment Of Social Security Taxes Through His Family Members' Returns Was Not An Inadvertent Consequence, But Was An Essential Component Of The Scheme.

The Seventh Circuit in *Chavin*, 316 F.3d at 677, defined the phrase, "the object of the offense" in § 2T1.1(c)(1) as "the *attempted* or *intended loss*, rather than the *actual* loss to the government . . . (emphasis in original)." The Fifth Circuit's decision in Petitioner's case appears to be in accord. *United States v. Phelps*, *supra*, 478 F.3d at 681 (whether Petitioner should be credited with excess Social Security tax payments against the tax loss "depends upon whether the payment is considered intentional"). App. 3.

Ms. Sanders' detailed schedules, admitted in evidence at Petitioner's sentencing hearing, reflected that, though Petitioner diverted income to his family members' returns, he timely paid all of the taxes due and owing on each of the individual returns, including all Social Security taxes as calculated per each return. Simply put, Petitioner's scheme was not to use his family members' returns to avoid the payment of his taxes altogether but, rather, to conceal his total income and, inferentially, to pay his taxes at a lower rate.[9] Petitioner's overpayment of Social Security taxes was

[9] The Factual Basis states that Petitioner informed his aunt that he wished to hide his income because he was dissolving a business partnership, and was going through a divorce. App. 21.

an essential component of this scheme. To be sure, a person is presumed to have generally intended the natural and probable consequences of his or her actions. *United States v. Alli*, 444 F.3d 34, 38 (1st Cir. 2006) (applied to a finding of "intended loss" in a fraud case), citing *United States v. Jacobs*, 117 F.3d 82, 95 (2d Cir. 1997). Under the common law rule, Petitioner's overpayment of Social Security taxes through his family members' returns was not an inadvertent consequence of his scheme.

## CONCLUSION

For all of these reasons, Charles Phelps, Jr., respectfully asks that this Honorable Court grant a writ of certiorari and review the judgment of the court of appeals.

Respectfully submitted,

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478 F.3d 680

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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05-51279

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHARLES PHELPS, JR.,
also known as Mr. D,
also known as Dave Smith,

Defendant-Appellant.

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Appeal from the United States District Court for the Western District of Texas, Waco

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(Filed February 12, 2007)

Before REAVLEY, JOLLY and BENAVIDES, Circuit Judges.

PER CURIAM:

Appellant's principal argument is that the district court erred in calculating the amount of tax loss, which determined the base offense level under the Sentencing Guidelines. We affirm.

## I. BACKGROUND

Charles Phelps, Jr. (Appellant) managed various adult entertainment businesses for his codefendant, John

Kenneth Coil. Over a period of several years, Appellant caused corporate monies to be falsely reported as wages paid to his family members. Ultimately, Appellant pleaded guilty to one count of conspiracy to defraud the United States by impeding the IRS in its collection of revenue in violation of 18 U.S.C. § 371.[1] The district court sentenced him to 42 months of imprisonment. On appeal, this Court remanded the case in light of *United States v. Booker*, 543 U.S. 220 (2005). On remand, after an evidentiary hearing, the district court found that Appellant intended to cause more than $80,000 but less than $200,000 in tax loss.[2] The district court sentenced Appellant to 36 months of imprisonment.

## II. ANALYSIS

### A. TAX LOSS CALCULATION

Appellant argues that the district court erred in calculating the amount of tax loss, resulting in an incorrect base offense level. This Court reviews a district court's application of the guidelines *de novo* and factual findings for clear error. *United States v. Roush*, 466 F.3d 380, 385 (5th Cir. 2006).

The district court found that the tax loss attributable to Appellant was more than $80,000 and less than

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[1] In exchange for his guilty plea, the remaining thirty-one counts in the indictment were dismissed.

[2] Appellant's original sentence had been based on a finding of a tax loss of more than $200,000 and less than $400,000.

$200,000, which translates to a base offense level of 16 under the Tax Table located in U.S.S.G. § 2T4.1.[3]

At the hearing before the district court on remand, Appellant presented the expert testimony of a financial investigator, Laura Sanders. Sanders presented a calculation of the tax loss attributable to Appellant as $80,463.64; however, she also testified that the excess social security taxes paid through Appellant's family members' fraudulent tax filings should be credited against that figure.

If Appellant is not entitled to such a credit, then even the defense expert's calculation results in a base offense level of 16. Thus, we must determine whether Appellant is entitled to credit any excess payments of social security taxes against the tax loss. As discussed below, that depends upon whether the payment is considered intentional. This Court apparently has not addressed this precise question but there is precedent that informs it. In *United States v. Moore,* 997 F.2d 55 (5th Cir. 1993), the defendants, like Appellant, were convicted of defrauding the United States in violation of 18 U.S.C. section 371. On appeal, those defendants argued that instead of using an "intended tax loss" amount, the court should have used the actual tax loss (zero) to the government. *Id.* at 60. The fraudulent refunds apparently had been recovered from the taxpayers. This Court rejected their argument. Although the *Moore* defendants were sentenced under U.S.S.G. § 2T1.4,[4] as opposed to § 2T1.1, we find it is

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[3] The 2001 version of the Sentencing Guidelines Manual was used for offense level computation.

[4] § 2T1.4 (Aiding, Assisting, Procuring, Counseling, or Advising Tax Fraud).

informative. This Court noted that the amount of tax loss determines the base offense level for several offenses, including tax evasion under § 2T1.1. *Moore,* 997 F.2d at 61. Indeed, we further noted that "[t]he cross references in these sections and the accompanying comments plainly indicate that the amount of the 'tax loss' is to be calculated *in a similar manner in each provision,* and that the amount the parties *attempted* to illegally obtain from the government controls over their eventual failure to actually acquire and retain their illegal refunds." *Id.* (emphasis in opinion).

Subsequently, we have relied on *Moore* for the propositions that "tax loss" is to be calculated in the same manner for sections 2T1.1, 2T1.3, and 2T1.4, and that tax loss is the intended loss, not the government's actual loss. *United States v. Clements,* 73 F.3d 1330 (5th Cir. 1996). Thus, we conclude that the analysis in *Moore* is applicable to the instant case.

Here, the district court expressly recognized that the issue was "the intended loss or potential loss, not necessarily the actual loss." The court further found as follows:

> I find that the evidence is more than sufficient to use as an amount of loss in calculating the base offense level the amounts attributable to him in the form of additional taxes. And that's basically embodied in Government Exhibit 1 in this case. It's less than $200,000, but it's more than $80,000.
>
> . . . .
>
> There's just no question in my mind that Mr. Phelps, regardless of any effort, today or otherwise, to put all the blame on Mr. Coil, that he

> *intentionally* set out to conceal the source of these funds, to conceal the true recipient of the funds, to do everything possible he could to hide what was going on, and with the obvious . . . if not objective side effect of fooling the Internal Revenue Service and trying to avoid the payment of taxes that were justly due and owing.

(emphasis added).

Appellant points out that the Second Circuit has interpreted § 2T1.1 as giving a "defendant the benefit of legitimate but unclaimed deductions" in calculating the tax loss. *United States v. Martinez-Rios,* 143 F.3d 662, 671 (2d Cir. 1998). Appellant candidly acknowledges the Tenth Circuit's opinion rejecting such an approach:

> We do not interpret this provision as giving taxpayers a second opportunity to claim deductions after having been convicted of tax fraud. It must be remembered that, in tax loss calculations under the sentencing guidelines, we are not computing an individual's tax liability as is done in a traditional audit. Rather, we are merely assessing the tax loss resulting from the manner in which the defendant chose to complete his income tax returns.

*United States v. Spencer,* 178 F.3d 1365, 1368 (10th Cir. 1999). Additionally, the Seventh Circuit has opined that "the current definition of tax loss appears to exclude consideration of unclaimed deductions." *United States v. Chavin,* 316 F.3d 666, 678 (7th Cir. 2002). The Court persuasively explained that the object of a defendant's "offense was the amount by which he underreported and fraudulently stated his tax liability on his return; reference to other unrelated mistakes on the return such as

unclaimed deductions tells us nothing about the amount of loss to the government that his scheme intended to create." *Id.* at 677.

We believe our precedent is more aligned with that of the Seventh and Tenth Circuits. We are not persuaded that the amount of tax loss Appellant intended to cause should be reduced simply because his scheme to defraud apparently inadvertently caused payment of excess social security taxes. More importantly, Appellant has not shown that the district court clearly erred in finding that he had the intent to cause more than $80,000 in tax loss. Appellant is not entitled to relief.

## B. SIXTH AMENDMENT CHALLENGE

Appellant contends that the district court erred in enhancing his sentence based on findings of fact made by a preponderance of the evidence. He argues that the Sixth Amendment was violated because the findings were not proven beyond a reasonable doubt. Appellant recognizes that our precedent precludes this claim. *United States v. Mares,* 402 F.3d 511 (5th Cir.), *cert. denied*, 126 S.Ct. 43 (2005); *United States v. Johnson,* 445 F.3d 793 (5th Cir.), *cert. denied*, 126 S.Ct. 2884 (2006). He raises it simply to preserve it for further review.

AFFIRMED.

UNITED STATES DISTRICT COURT
Western District of Texas
WACO DIVISION

UNITED STATES OF AMERICA

Case Number W:03-CR-197(6)-H
USM Number 53-433-079

v.

CHARLES PHELPS, JR.
Aliases: Chuck Phelps;
Dave Smith; Mr. D.; Tex

Defendant.

**JUDGMENT IN A CRIMINAL CASE**
(For Offenses Committed On or After November 1, 1987)

(Filed Aug. 22, 2005)

The defendant, CHARLES PHELPS, JR., was represented by Mr. Ronald P. Guyer.

On motion of the Government, the Court has dismissed Counts 1 through 17, 22 and 25 through 28 of the original indictment, and Counts 1 through 21 and 23 through 28 of the Superseding Indictment as to this defendant.

The defendant pled guilty to Count 22 of the Superseding Indictment on June 11, 2004. Accordingly, the defendant is adjudged guilty of such Count, involving the following offense:

| Title & Section | Nature of Offense | Date of Offense | Count |
|---|---|---|---|
| 18 USC 371 | Conspiracy to Defraud the United States | December 9, 2003 | 22 |

As pronounced on August 18, 2005, the defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is further ordered that the defendant shall notify the United States Attorney for the district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant must notify the Court and United States Attorney of any material changes in economic circumstances.

Signed this the 19th day of August, 2005.

/s/ Harry Lee Hudspeth
HARRY LEE HUDSPETH
Senior United States
District Judge

**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of THIRTY-SIX (36) MONTHS.

The Court makes the following recommendations to the Bureau of Prisons:

that the defendant serve the sentence at F C I Bastrop, Texas.

The defendant may remain on bond pending designation, but must surrender to the institution designated by the Bureau of Prisons no later than October 17, 2005, at 2:00 P.M.

## RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

_____
United States Marshal

By: _____
Deputy U.S. Marshal

## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS.

While on supervised release, the defendant shall comply with the mandatory, standard and if applicable, the special conditions that have been adopted by this Court as set forth on pages 4 and 5 of this judgment; and shall comply with the following additional conditions:

X The defendant shall cooperate fully with the Internal Revenue Service in ascertaining the amount of tax owed and in collecting any tax deficiency which may be determined by the Service.

## CONDITIONS OF SUPERVISIONS

**Mandatory Conditions:**

1) The defendant shall not commit another federal, state, or local crime.

2) The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

3) In supervised release cases only, the defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

4) If convicted of a felony, the defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

5) The defendant shall cooperate in the collection of DNA as directed by the probation officer if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 1413a).

6) If convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4), the defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer.

7) If convicted of a domestic violence crime as defined in 18 U.S.C. § 356(b), the defendant shall participate in an approved program for domestic violence.

8) If the judgment imposes a fine or restitution, it is a condition of supervision that the defendant pay in accordance with the Schedule of Payments sheet of the judgment.

**Standard Conditions:**

1) The defendant shall not leave the judicial district without permission of the court or probation officer.

2) The defendant shall report to the Probation Officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the Probation Officer and follow the instructions of the Probation Officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation, unless excused by the Probation Officer for schooling, training or other acceptable reasons.

6) The defendant shall notify the Probation Officer at least ten days prior to any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substance, except as prescribed by a physician.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the Probation Officer.

10) The defendant shall permit a Probation Officer to visit him or her at any time at home or elsewhere and

shall permit confiscation of any contraband observed in plain view of the Probation Officer.

11) The defendant shall notify the Probation Officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or special agent of a law enforcement agency without the permission of the Court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

14) If convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4), or has a prior conviction of a State or local offense that would have been an offense as described in 18 U.S.C. § 4042(c)(4) if a circumstance giving rise to Federal jurisdiction had existed, the defendant shall participate in a sex offender treatment program approved by the probation officer. The defendant shall abide by all program rules, requirements and conditions of the sex offender treatment program, including submission to polygraph testing, to determine if the defendant is in compliance with the conditions of release. The defendant may be required to contribute to the cost of the services rendered (copayment) in an amount to be determined by the probation officer, based on the defendant's ability to pay.

15) The defendant shall submit to an evaluation for substance abuse or dependency treatment as directed by the probation officer, and if deemed necessary by the probation officer, the defendant shall participate

in a program approved by the probation officer for treatment of narcotic addiction or drug or alcohol dependency which may include testing and examination to determine if the defendant has reverted to the use of drugs or alcohol. The defendant may be required to contribute to the cost of the services rendered (copayment) in an amount to be determined by the probation officer, based upon the defendant's ability to pay.

16) The defendant shall submit to an evaluation for mental health counseling as directed by the probation officer, and if deemed necessary by the probation officer, the defendant shall participate in a mental health program approved by the probation officer. The defendant may be required to contribute to the cost of the services rendered (copayment) in an amount to be determined by the probation officer, based upon the defendant's ability to pay.

17) If the defendant is excluded, deported, or removed upon release from imprisonment, the term of supervised release shall be a non-reporting term of supervised release. The defendant shall not illegally reenter the United States. If the defendant lawfully reenters the United States during the term of supervised release, the defendant shall immediately report in person to the nearest U.S. Probation Office.

18) If the judgment imposes other criminal monetary penalties, it is a condition of supervision that the defendant pay such penalties in accordance with the Schedule of Payments sheet of the judgment.

19) If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall provide the probation officer access to any requested financial information.

20) If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall not incur any new credit charges or open additional lines of credit without the approval of the probation officer unless the defendant is in compliance with the payment schedule.

The Court further adopts such of the following special conditions applied to the supervised person by the judge at the time of sentencing:

1) **COMMUNITY CONFINEMENT:** The defendant shall reside in a Community Corrections Center for a period of ___ months to commence on _____. Further, once employed, the defendant shall pay 25% of his/her weekly gross income for his/her subsistence as long as that amount does not exceed the daily contract rate.

2) **HOME DETENTION:** The defendant shall participate in the Home Confinement Program for a period of ___ days/months. During this time the defendant shall remain at his/her place of residence except for employment and other activities approved in advance by the probation officer. The defendant shall maintain a telephone at his/her place of residence without "call forwarding," a "modem," "caller ID," "call waiting," or portable cordless telephones for the above period. At the direction of the probation officer, the defendant shall wear an electronic monitoring device and follow electronic monitoring procedures specified by the probation officer. The court further orders that the defendant shall pay for the costs of Home Confinement, as directed by the probation officer.

3) **COMMUNITY SERVICE:** The defendant shall perform ___ hours of community service work without pay, at a location approved by the probation officer, at

a minimum rate of four hours per week, to be completed during the first ___ months of supervision.

**CRIMINAL MONETARY PENALTIES/SCHEDULE**

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth. Criminal Monetary Penalties, except those payments made through Federal Bureau of Prisons' Inmate Financial Responsibility Program shall be paid through the Clerk, United States District Court, 200 W. 8th Street, Room 130 Austin, Texas 78701.

| | Total Assessment | Fine | Restitution |
|---|---|---|---|
| TOTAL: | $100.00 | $5,000.00 | $0 |

**Special Assessment**

It is ordered that the defendant shall pay to the United States a special assessment of $100.00. Payment of this sum shall begin immediately.

**Fine**

The defendant shall pay a fine of $5,000.00. Payment of this sum shall begin immediately. This fine includes costs of incarceration and/or supervision. The fine is below guideline range because of the other substantial penalties, civil and criminal, to which this defendant is subject.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to

18 U.S.C. § 3664(i), all non-federal victims must be paid before the United States is paid.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. §3614.

The defendant shall pay interest on any fine or restitution of more than $2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. §3612(f). All payment options may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

IN THE UNITED STATES OF APPEALS
FOR THE FIFTH CIRCUIT

---

No. 05-51279

---

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

CHARLES PHELPS, JR, also known as Mr D,
also known as Dave Smith

Defendant-Appellant

---

Appeal from the United States District Court for the
Western District of Texas, Waco

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**ON PETITION FOR REHEARING**

(Filed Mar. 16, 2007)

Before REAVLEY, JOLLY, and BENAVIDES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is Denied.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit
Judge

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| Plaintiff, | ) | CRIMINAL NO. |
| v. | ) | W-03-CR-197(6)H |
| CHARLES PHELPS, JR., | ) | |
| Defendant. | ) | |

FACTUAL BASIS

(Filed Jun. 11, 2004)

Had this matter proceeded to trial, the United States Attorney was prepared to prove the following facts:

Beginning in 1997 co-Defendant Charles Phelps, Jr. told his son, Defendant Charles Joseph Phelps, that Phelps, Jr. would prepare and file Charles Joseph Phelps' tax returns. At various times from 1997 to 2002 Phelps, Jr. had Charles Joseph Phelps sign blank Form 1040 Individual Income Tax Returns for the 1996 through 2001 tax returns. Charles Joseph Phelps would in turn give Phelps, Jr. all W-2 forms Charles Joseph Phelps had received for those tax years. Thereafter, Charles Phelps, Jr. falsely assigned and included income that had not been earned by Charles Joseph Phelps on Charles Joseph Phelp's tax returns.

The 1996 return falsely reported that Charles Joseph Phelps had received wages from AVE, Inc. In addition it reported that he had received interest or dividend income from a Merrill Lynch account.

The 1997 return falsely reported that Charles Joseph Phelps had received wages from AVE, Inc. and Hot Val, Inc. In addition, it reported falsely dividend or interest *income from a Merrill Lynch account.*

The 1998 and 1999 returns falsely reported that Charles Joseph Phelps had received wages from AVE, Inc. and Adust, Inc. Moreover, it falsely reported that Charles Joseph Phelps had received interest or dividend income from Merrill Lynch and Crawford Acceptance Co.

Finally, the 2000 and 2001 returns falsely reported that Charles Joseph Phelps had received wages from AVE, Inc. and dividend or interest income from Merrill Lynch.

The income falsely reported on Charles Joseph Phelps' tax returns had been deposited into the Crawford Acceptance and Merrill Lynch accounts. This income totaled approximately $394,000. ~~Those funds were subsequently used by Charles Phelps, Jr. to purchase assets owned and/or controlled by Charles Phelps, Jr., or to further his business interests.~~ [/s/ RPG, CP, MHM]

Charles Phelps, Jr. is the nephew of Sylvia Boutte. Charles Joseph Phelps is the son of Charles Phelps, Jr. Christina M. Phelps is the daughter of Charles Phelps, Jr.

At various times after January 1, 1997, and continuing up to April 15, 2002, Sylvia Boutte was contacted by Charles Phelps, Jr., to prepare the Forms 1040 and/or Forms 1040A U.S. Individual Income Tax Returns for the following persons, bearing their respective social security numbers, for the tax years indicated:

| | |
|---|---|
| Charles Phelps, Jr. | 1996 and 1997 |
| Christina M. Phelps | 1997 through 2001 |
| Charles Joseph Phelps | 1996 through 2001 |

Charles Phelps, Jr. brought to Boutte's residence in Bandera, Texas, located within the Western District of Texas, all of the Forms W-2, Forms 1099 and/or other tax related documents necessary to complete the tax returns in the names of the above identified persons. Charles Phelps, Jr. instructed Boutte to prepare the tax returns for each of the persons identified above. Once the tax returns were prepared by Boutte, she contacted Charles Phelps, Jr. who picked up the completed tax returns from Boutte's residence.

In early 1999, Charles Phelps, Jr. provided approximately $4,700.00 in United States currency to pay the additional tax due and owing shown on Charles Joseph Phelps' 1998 tax return. That additional tax due and owing amount was $4,632.00. Boutte paid this additional tax due amount at Charles Phelps, Jr.'s direction.

In early 1999, Charles Phelps, Jr. contacted Sylvia Boutte and told her that he needed her to claim $100,000.00 in wages from AVE, Inc. on her United States Individual Income Tax Return for tax year 1998. Charles Phelps, Jr. told Boutte that he was in the process of dissolving a business partnership and was going through a divorce, and wanted to hide the income. Charles Phelps, Jr. told Boutte that the income was actually his own. Boutte never received any wages from AVE, Inc., but Boutte agreed with Charles Phelps, Jr. to include the funds on her tax return in order to assist Charles Phelps, Jr. in hiding his income. Charles Phelps, Jr. also gave to Boutte the necessary funds to pay the tax on the wages that she agreed to claim at Charles Phelps, Jr.'s instruction and further instructed her to pay that to the Internal Revenue Service just as he had done with Charles Joseph Phelps.

Charles Phelps, Jr. provided Boutte with the false Form W-2, from AVE, Inc., which she attached to her tax

return. Based on the instructions from Charles Phelps, Jr., Boutte mailed that tax return to the Internal Revenue Service in Austin, Texas, located within the Western District of Texas.

In approximately May 1999, Charles Phelps, Jr. contacted Sylvia Boutte and gave her approximately $28,319.00. Charles Phelps, Jr. told Boutte to deposit the funds into her bank account at Bandera Bank, Bandera, Texas, and to purchase a cashier's check payable to "Merrill Lynch CMA 52261984", and to show the remitter on the cashier's check as "Christina Phelps." On May 13, 1999, Boutte purchased cashier's check #28234, in the amount of $28,319.00, from Bandera Bank, and included the payee and remitter information as instructed by Charles Phelps, Jr. Boutte then provided the cashier's check to Charles Phelps, Jr. Bandera Bank is located within the Western district of Texas. The endorsement and bank information on the back of this cashier's check indicates that the check was deposited into the Merrill Lynch CMA 52261984 account.

Again in early 2000, Charles Phelps, Jr. contacted Sylvia Boutte and told her that he needed her to claim $45,500.00 in wages from AVE, Inc., on her personal tax return for tax year 1999. Charles Phelps, Jr., told Boutte that he again wanted to hide his income. Boutte never received any wages from AVE, Inc., but Boutte agreed with Charles Phelps, Jr. to include the funds on her tax return to assist Charles Phelps, Jr. in hiding this income. Again, Charles Phelps, Jr. gave Boutte the funds to pay the tax on the wages that she was claiming at Charles Phelps, Jr.'s request. Charles Phelps, Jr. provided Boutte with the Form W-2 from AVE, Inc., which she attached to the false United States Individual Income Tax Return. Boutte

mailed that tax return to the Internal Revenue Service in Austin, Texas, located within the Western District of Texas.

These acts by Charles Phelps, Jr. were designed to conceal the true source and disposition of funds that were actually earned by Charles Phelps, Jr., and in so doing would impair and impede the lawful function of the Internal Revenue Service.

That in summary would be the evidence presented by the United States.

JOHNNY SUTTON
United States Attorney

/s/ Mark H. Marshall
MARK H. MARSHALL
Assistant U. S. Attorney
State Bar No. 13032500

I have read the United States Factual Basis, and reviewed it with my attorney. I hereby admit that all of the allegations contained in the Factual Basis are true and correct and that I am guilty of the offenses charged in the indictment.

/s/ Charles Phelps, Jr. — 6-11-2004
CHARLES PHELPS, JR. — Date
Defendant

/s/ Ronald Guyer — 6-11-04
RONALD GUYER — Date
Attorney

*Charles Phelps, Jr.*

***Corporate Tax Loss due to Fictitious Wage Deduction***

| | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | Total |
|---|---|---|---|---|---|---|---|
| AVE, Inc. | $ 2,040.00 | $ 9,690.00 | $ 56,780.00 | $ 62,560.00 | $ 27,730.00 | $ 20,570.00 | $179,370.00 |
| Hot-Val, Inc | $ - | $ 3,900.00 | $ 593.00 | $ 1,630.00 | $ - | $ - | $6,123.00 |
| Adust Video, Inc. | $ - | $ - | $ 1,125.00 | $ - | $ - | $ - | $1,125.00 |
| Total | $2,040.00 | $13,590.00 | $58,498.00 | $64,190.00 | $27,730.00 | $20,570.00 | $186,618.00 |

***Personal Tax Loss (Including unreported dividends from GNCD, Inc.)***

| | | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | Total |
|---|---|---|---|---|---|---|---|---|
| Charles Phelps, Jr. | | 2,661.50 | $15,873.00 | $42,560.00 | $54,152.00 | $8,276.00 | $8,516.00 | $132,038.50 |
| Credit for taxes paid with the returns filed, as it relates to the fictitious wages See Note 1 Below | Joseph | $ 570.00 | $ 1,082.00 | $ 4,632.00 | $ 2,551.00 | $ 3,610.00 | $ - | $ 12,445.00 |
| | Christina | $ - | $ - | $ - | $ - | $ - | $ - | $ - |
| | Sylvia | $ - | $ - | $ 7,059.00 | $ 4,740.00 | $ - | $ - | $ 11,799.00 |

| *Total Tax Loss to Government* | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | Total |
|---|---|---|---|---|---|---|---|
| Pers. + Corp. | $4,701.50 | $29,463.00 | $101,058.00 | $118,342.00 | $36,006.00 | $29,086.00 | $318,656.50 |

Note 1 – The amounts for Sylvia Boutte in tax years 1998 and 1999 do not include credit for the Self Employment tax that was paid when the return was filed since that SE tax was not related to the false wages she claimed. Additionally, any tax the nominees paid was deducted from the total tax

Charles Phelps Jr.
SSN: 463-82-XXXX

| Description | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | TOTALS |
|---|---|---|---|---|---|---|---|
| Taxable Income Per Return | 37,671.00 | 41,709.00 | 16,332.00 | 43,053.00 | 30,482.00 | 274,956.00 | 444,203.00 |
| income Diverted: | | | | | | | |
| To Charles Joseph Phelps – Son | 12,985.00 | 40,688.00 | 79,276.00 | 87,943.00 | 80,371.00 | 63,176.00 | 364,439.00 |
| To Sylvia Boutte – Aunt | | | 100,000.00 | 45,500.00 | | | 145,500.00 |
| To Christina M. Phelps – Daughter | | | 2,446.00 | 62,621.00 | 7,400.00 | 84.00 | 72,551.00 |
| Total Diverted Income | 12,985.00 | 40,688.00 | 181,722.00 | 196,064.00 | 87,771.00 | 63,260.00 | 582,490.00 |
| GNCD – Dividends | - | 33,320.00 | 30,000.00 | 34,000.00 | 10,000.00 | - | 107,320.00 |
| Corrected Taxable Income | 50,656.00 | 115,717.00 | 228,054.00 | 273,117.00 | 128,253.00 | 338,216.00 | 1,134,013.00 |
| Corrected Tax per Guidelines | 14,183.68 | 32,400.76 | 63,855.12 | 76,472.76 | 35,910.84 | 94,700.48 | 317,523.64 |
| Tax Per Charles Phelps Jr.'s Return | 7,541.00 | 8,479.00 | 2,449.00 | 7,570.00 | 4,571.00 | 82,686.00 | 113,296.00 |
| Excess Tax Paid on Other Returns: | | | | | | | |
| Charles Joseph Phelps – Son | 964.00 | 6,645.00 | 18,694.00 | 20,377.00 | 20,465.00 | 14,299.00 | 81,444.00 |
| Sylvia Boutte – Aunt | | | 21,200.00 | 6,885.00 | | | 28,085.00 |
| Christina M. Phelps – Daughter | | | | 13,278.00 | 949.00 | 8.00 | 14,235.00 |
| Total Tax Paid | 8,505.00 | 15,124.00 | 42,343.00 | 48,110.00 | 25,985.00 | 96,993.00 | 237,060.00 |
| Tax Due | 5,678.68 | 17,276.76 | 21,512.12 | 28,362.76 | 9,925.84 | (2,292.52) | 80,463.64 |
| Credit for Excess Social Security Paid | - | (2,220.06) | (11,709.81) | (18,408.73) | (5,365.63) | (4,545.87) | (42,250.10) |
| Total Tax Due | 5,678.68 | 15,056.70 | 9,802.31 | 9,954.03 | 4,560.21 | (6,838.39) | 38,213.54 |

Charles Phelps Jr.
SSN: 463-82-XXXX
Computation of Excess Social Security Paid

| Description | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | TOTALS |
|---|---|---|---|---|---|---|---|
| Social Security Wages per Ave for Charles Phelps Jr. | 36,000.00 | 39,100.00 | 33,000.00 | 72,600.00 | 45,300.00 | 63,690.00 | 289,690.00 |
| Social Security Wages per Hot Val for Charles Phelps Jr. | 7,947.52 | 9,370.70 | 4,187.34 | 2,084.50 | 2,274.00 | 379.00 | 26,243.05 |
| Social Security Wages per Adust Video for Charles Phelps Jr. | | | 568.49 | | | | 568.49 |
| Social Security Wages Diverted to Son | 6,000.00 | 38,500.00 | 74,500.00 | 72,600.00 | 76,200.00 | 60,500.00 | 328,300.00 |
| Social Security Wages Diverted to Daughter | | | 1,520.00 | 56,680.00 | 4,560.00 | | 61,760.00 |
| Social Security Wages Diverted to Aunt | | | 68,400.00 | 45,500.00 | | | 113,900.00 |
| Total Social Security Wages | 49,947.52 | 86,970.70 | 182,175.83 | 251,464.50 | 128,334.00 | 124,569.00 | 823,461.55 |
| Calling for Social Security Wages | 62,700.00 | 55,400.00 | 68,400.00 | 72,600.00 | 76,200.00 | 80,400.00 | 425,700.00 |
| Excess Social Security Wages | - | 21,570.70 | 113,775.83 | 178,864.50 | 52,134.00 | 44,169.00 | 410,514.03 |
| Excess Social Security Tax paid by Employee 6.2% | - | 1,337.38 | 7,054.10 | 11,089.60 | 3,232.31 | 2,738.48 | 25,451.87 |
| Excess Social Security Paid by Employer 8.2% | - | 1,337.38 | 7,054.10 | 11,089.60 | 3,232.31 | 2,738.48 | 25,451.87 |
| Corporate Tax Savings 34% on Excess Paid | | 454.71 | 2,398.39 | 3,770.46 | 1,098.98 | 931.08 | 8,653.64 |
| Net Excess Paid by Employer | - | 882.67 | 4,655.71 | 7,319.14 | 2,133.32 | 1,807.40 | 16,798.23 |
| Total Excess Paid | - | 2,220.06 | 11,709.81 | 18,408.73 | 5,365.63 | 4,545.87 | 42,250.10 |

Diverted Income Summary for Charles Phelps Jr. with GNCD

| Nominee Payees | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | TOTALS |
|---|---|---|---|---|---|---|---|
| Charles Joseph Phelps | 12,985.00 | 40,688.00 | 79,276.00 | 87,943.00 | 80,371.00 | 63,176.00 | 364,439.00 |
| Christina Phelps | | | 2,446.00 | 62,621.00 | 7,400.00 | 84.00 | 72,551.00 |
| Sylvia Boutte | | | 100,000.00 | 45,500.00 | | | 145,500.00 |
| Diverted Income | 12,985.00 | 40,688.00 | 181,722.00 | 196,064.00 | 87,771.00 | 63,260.00 | 582,490.00 |
| GNCD | - | 33,320.00 | 30,000.00 | 34,000.00 | 10,000.00 | - | 107,320.00 |
| Total | 12,985.00 | 74,008.00 | 211,722.00 | 230,064.00 | 97,771.00 | 63,260.00 | 689,810.00 |
| Tax Loss | 5,678.68 | 15,056.70 | 9,802.31 | 9,954.03 | 4,560.21 | (6,838.39) | 38,213.54 |

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SUPREME COURT, U.S.

No. 06-1667

# In the Supreme Court of the United States

CHARLES PHELPS, JR., PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether, under Sentencing Guidelines § 2T1.1, the amount of income tax loss a defendant intends to cause by a scheme to defraud should be reduced to the extent that he inadvertently causes payment of excess social-security taxes.

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# In the Supreme Court of the United States

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CHARLES PHELPS, JR., PETITIONER

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-6) is reported at 478 F.3d 680.

### JURISDICTION

The judgment of the court of appeals was entered on February 12, 2007. A petition for rehearing was denied on March 16, 2007 (Pet. App. 17-18). The petition for a writ of certiorari was filed on June 13, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

Following a guilty plea in the United States District Court for the Western District of Texas, petitioner was convicted of one count of conspiracy to defraud the United States, in violation of 18 U.S.C. 371. He was sentenced to 36 months of imprisonment, to be followed by

three years of supervised release. The court of appeals affirmed. Pet. App. 1-6.

1. Petitioner managed various adult-entertainment businesses that he co-owned with John Kenneth Coil. Pet. App. 1-2. A grand jury sitting in the Western District of Texas returned a 32-count indictment charging petitioner, Coil, and others with racketeering, mail fraud, various offenses related to obscene materials, and conspiracy to defraud the United States. Gov't C.A. Br. 2-3. Ultimately, petitioner pleaded guilty to one count of conspiracy to defraud the United States by impeding the Internal Revenue Service (IRS) in its computation, assessment, and collection of revenue, in violation of 18 U.S.C. 371. Gov't C.A. Br. 3.

The conspiracy charge to which petitioner pleaded guilty was based on petitioner's failure to report as income money that petitioner received from his businesses between 1997 and 2002. Pet. App. 19-23. Petitioner enlisted members of his family to falsely report that money as wage, dividend, and interest income on their tax returns. Petitioner sent funds to his family members to pay for the additional tax reflected on their tax returns. Petitioner's acts, which concealed the true source and disposition of petitioner's income from his businesses, constituted an attempt to impair and impede the IRS's ability to assess and collect the taxes that petitioner owed. *Ibid.*

2. Petitioner was initially sentenced to 42 months of imprisonment. After this Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005), the court of appeals remanded the case to the district court for resentencing. Pet. App. 2.

3. On remand, the district court determined that petitioner intended to cause a personal income tax loss

of more than $80,000 but less than $200,000, which corresponded to a base offense level of 16 under the advisory Sentencing Guidelines. Pet. App. 2-3. After the imposition of pertinent enhancements, the total offense level was 20, which yielded an advisory Guidelines range of 33 to 41 months. Gov't C.A. Br. 8. Petitioner was sentenced to 36 months of imprisonment, to be followed by three years of supervised release. Pet. App. 8-9.

4. The court of appeals affirmed. Pet. App. 1-6.

The court of appeals rejected petitioner's claim that the district court erred in calculating the tax loss. Petitioner argued that the loss caused by his underpayment of personal income tax should be reduced by the amount of social-security tax paid on the money fraudulently reported as wages of petitioner's family members, which petitioner's expert calculated as being $42,250. According to petitioner, because he had already paid the maximum annual social-security tax with respect to the wage income he did report, he would not have paid additional social-security tax if the money assigned to his family had instead been reported as his wages. Petitioner contended that he should be credited with $42,250 in social security tax, which would reduce the total tax loss to $38,213, the total offense level to 18, and the advisory Guidelines range to 27 to 33 months. Pet. 6-7; Pet. App. 27.

The court of appeals held that, for sentencing purposes, the "tax loss is the intended loss, not the government's actual loss." Pet. App. 4. It explained that the amount of income tax loss petitioner intended to cause should not be reduced "simply because his scheme to defraud apparently inadvertently caused payment of excess social security taxes." *Id.* at 6. Because the district court found that the income tax loss intended by

petitioner exceeded $80,000, the court of appeals concluded that it appropriately calculated petitioner's sentence based on that amount. *Ibid.*

In so holding, the court of appeals rejected petitioner's reliance on *United States* v. *Martinez-Rios*, 143 F.3d 662 (1998), in which the Second Circuit interpreted Sentencing Guidelines § 2T1.1 as giving a "defendant the benefit of legitimate but unclaimed deductions" in the calculation of tax loss. Pet. App. 5 (quoting *Martinez-Rios*, 143 F.3d at 671). Instead, the court held that its precedent was "more aligned with that of the Seventh and Tenth Circuits," which have held that the tax loss determined by considering the object of the offense should not be reduced by inadvertent mistakes such as unclaimed deductions. *Id.* at 6. See *United States* v. *Spencer*, 178 F.3d 1365, 1368 (10th Cir. 1999); *United States* v. *Chavin*, 316 F.3d 666, 678 (7th Cir. 2002).

## ARGUMENT

Petitioner contends (Pet. 8-15) that the district court should have considered the overpayment of social-security tax by petitioner's family members in determining the amount of the tax loss for purposes of Sentencing Guidelines § 2T1.1(c). The court of appeals correctly rejected that claim. Petitioner identifies a conflict between the Second Circuit and the Fifth, Seventh, and Tenth Circuits in the interpretation of Section 2T1.1(c). That conflict can be resolved by the United States Sentencing Commission, and it does not warrant this Court's review. In any event, this case is a poor vehicle for addressing the conflict, because petitioner cannot show that he would prevail under the standard applied by any court of appeals. Further review is not warranted.

1. As an initial matter, review would be unwarranted even if the decision below directly conflicted with a decision of another court of appeals. This Court ordinarily does not review decisions interpreting the Sentencing Guidelines, because the Sentencing Commission can amend the Guidelines to eliminate a conflict or correct an error. See *Braxton* v. *United States*, 500 U.S. 344, 347-349 (1991). The Commission is charged by Congress with "periodically review[ing] the work of the courts" and making "whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." *Id.* at 348; see *United States* v. *Booker*, 543 U.S. 220, 263 (2005) ("The Sentencing Commission will continue to collect and study appellate court decision-making. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices."). Particularly because the Guidelines are now advisory, see *id.* at 243, this Court's review of the court of appeals' interpretations of the Guidelines is not warranted.

2. In *United States* v. *Martinez-Rios*, 143 F.3d 662, 671 (1998), the Second Circuit stated that the "determination of the tax loss" under Sentencing Guidelines § 2T1.1 requires "giving the defendant the benefit of legitimate but unclaimed deductions." Likewise, in *United States* v. *Gordon*, 291 F.3d 181, 187 (2002), cert. denied, 537 U.S. 1114 (2003), the Second Circuit held that a district court errs "when it refuse[s] to consider any potential unclaimed deductions in its sentencing analysis." But the court further held that the defendant "bears the full burden of proof" in establishing entitlement to legitimate, unclaimed deductions. *Ibid.* Thus, in *Gordon*, the error was harmless because the defendant "failed to prove that the money he received would

have been treated as [tax deductible] salary * * * if properly reported." *Ibid.* The court rejected as insufficient the defendant's assertion that "salary treatment was likely," instead holding that the defendant was required to demonstrate that the money he received actually "would have" been treated as salary. *Id.* at 188.

The Seventh and Tenth Circuits have rejected the Second Circuit's approach. The Guidelines define "tax loss" as "the total amount of loss that was the object of the offense (*i.e.*, the loss that would have resulted had the offense been successfully completed)." Sentencing Guidelines § 2T1.1(c)(1). That definition, the Seventh Circuit has held, refers to "the *attempted* or *intended* loss, rather than the *actual* loss to the government." *United States* v. *Chavin*, 316 F.3d 666, 677 (2002). Under that definition, "the object of [the defendant's] offense was the amount by which he underreported and fraudulently stated his tax liability on his return; reference to other unrelated mistakes on the return such as unclaimed deductions tells us nothing about the amount of loss to the government that his scheme intended to create." *Ibid.* Accord *United States* v. *Spencer*, 178 F.3d 1365, 1368-1369 (10th Cir. 1999).

3. This case does not implicate the conflict that exists between the decisions of the Second Circuit and those of the Seventh and Tenth Circuits. As petitioner acknowledges (Pet. 13), the case presents "a somewhat different issue" from that presented in the cases he cites. Petitioner "did not ask the district court to give him the benefit of legitimate, but unclaimed, deductions"; rather, petitioner states (*ibid.*), he asked that "excess of Social Security taxes he timely paid in per his family members' returns be deducted against the tax loss." Petitioner concedes that there is a difference be-

tween what the Second Circuit has permitted— allowing an unclaimed deduction as an offset to income that went unreported on the same tax return—and what petitioner seeks—reducing the intended income tax loss, dollar for dollar, by a different type of tax paid by a different person. Petitioner does not explain why the Second Circuit, applying *Martinez-Rios* and *Gordon*, would allow him to reduce his income tax loss by the putative overpayment of social-security taxes on his family members' returns.

Even if this case involved the same issue as the one on which the circuits have divided, it would be a poor vehicle for resolving it, because petitioner cannot prevail under either approach. Under the Second Circuit's approach, a defendant must prove actual entitlement to the claimed deduction. See *Gordon*, 291 F.3d at 187 (defendant "bears the full burden of proof" in establishing entitlement to unclaimed deductions). Here, petitioner failed to prove that the diverted funds were actually wages, either for petitioner or for his relatives. Gov't C.A. Br. 23. He also failed to prove that the social-security taxes paid in the names of his family members constituted an overpayment of *his* social-security taxes. *Id.* at 24-25. Because he did not prove entitlement to a credit for the social-security taxes in the district court, petitioner's sentence would be affirmed even in the Second Circuit.

4. Finally, petitioner challenges (Pet. 14) the court of appeals' determination that he "inadvertently caused payment of excess social security taxes." Pet. App. 6. Petitioner argues that, even under the definition of tax loss applied in the decision below, he is entitled to offset the overpayment of social-security taxes against the intended income tax loss, because the overpayment of social-security taxes was part of "the object of the of-

fense." In support of his theory, petitioner asserts (Pet. 14-15) that his "overpayment of Social Security taxes through his family members' returns was not an inadvertent consequence of his scheme," because his "scheme was not to use his family members' returns to avoid the payment of his taxes altogether but, rather, to conceal his total income and, inferentially, to pay his taxes at a lower rate."

That argument lacks merit. The fact that petitioner's fraudulent assignment of income to his relatives led them to pay social-security taxes does not mean that the overpayment of social-security tax was an "object of the offense." The object of an offense is the *illegal* objective that a defendant seeks to obtain, not a collateral benefit to the government flowing from other individuals' payment of a different type of tax. In any event, the court's factbound determination that petitioner "inadvertently caused payment of excess social security taxes" has no significance outside of the present case, and it does not warrant further review.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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